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GEE SIEW YEE

v.

ANN WAM TIANG

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
RAUS SHARIF JCA
[CIVIL APPEAL NO: W-02-434-2006]

C

20 NOVEMBER 2007

CIVIL PROCEDURE: *Judgments and orders - Consent order - Variation - Intervening events - Whether subject matter of original order no longer in existence - Whether variation warranted and justified by*

D *intervening events*

The plaintiff had filed a writ action against the defendant for the return of 650,000 Sunway Construction Berhad shares ('SunCon shares') allegedly loaned by him to the defendant, and following

E that an application for an injunction to restrain the defendant from disposing of the said shares. Thereafter, the parties entered into a consent order ('consent order'), whereby *inter alia* the plaintiff agreed to withdraw the application for injunction and the defendant agreed to refrain from dealing with the SunCon shares

F until the disposal of the writ action. Subsequently, however, the defendant's SunCon shares were acquired by one Sunway Holdings Incorporated Berhad ('SunInc') for a consideration of 650,000 units of SunInc shares and a cash payment of RM715,000. The plaintiff argued that the intervening events had

G affected the efficacy of the consent order, and in the circumstances applied for a variation thereof, effectively to restrain the defendant from dealing with the 650,000 SunInc shares and for the sum of RM715,000 to be deposited into court pending the disposal of the writ action. The learned judge allowed the

H application and the defendant appealed. Before the learned justices of appeal, the salient issues that arose were: (i) whether the learned trial judge could lawfully vary the consent order; (ii) whether the 650,000 SunInc shares were benefits derived from the original 650,000 SunCon shares; (iii) whether the consent order

I would be 'a dead letter' if not varied; and (iv) whether the cash payment in question constituted unjust enrichment to the defendant.

Held (dismissing the appeal)
Per Raus Sharif JCA delivering the judgment of the court:

(1) The consent order is in the nature of an interlocutory order as it does not finally determine the dispute between the parties in respect of the subject matter in the suit. The court has always have control over interlocutory orders. It may in its discretion vary or alter them even though made originally by consent. (para 14)

(2) The learned judge has rightly exercised his discretion in varying the consent order. This is a case where the subject matter of the consent order is no longer in existence. The SunCon shares has been converted into SunInc shares due to a corporate exercise. The 650,000 SunCon shares and cash of RM715,000 are derivative shares and benefits derived from the original 650,000 SunCon shares. Further, the sum of RM715,000 sought to be deposited into court is clearly not from the defendant's own fund. The defendant had in substance agreed pursuant to the consent order that she would not reap personal benefits from the SunCon shares until final adjudication by the court. Consequently, there is no question of hardship suffered for her to deposit the said sum into court. (para 15)

(3) The variation is to reflect the new scenario which existed after the corporate exercise. It is only by varying the consent order that the undertaking previously given by the defendant under the consent order will maintain its intended effect. Otherwise, it would be 'a dead letter'. (para 16)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif telah memfail satu tindakan writ terhadap defendan memohon pemulangan 650,000 saham Sunway Construction Berhad ('saham-saham SunCon') yang didakwa dipinjamkan olehnya kepada defendan, dan selepas itu satu permohonan injunksi bagi menghalang defendan dari melupuskan saham-saham tersebut. Berikutnya pihak-pihak telah memeterai satu perintah persetujuan ('Perintah Persetujuan') di mana, antara lain, plaintif bersetuju menarik balik permohonan injunksi dan defendan pula bersetuju untuk tidak berurusan dengan saham-saham SunCon sehingga tindakan writ diputuskan. Bagaimanapun, saham-saham SunCon defendan kemudiannya telah diambilalih oleh syarikat Sunway Holdings Incorporated Berhad ('SunInc') dengan balasan

650,000 saham SunInc dan bayaran tunai RM715,000. Plaintif berhujah bahawa perkembangan terbaru tersebut telah menjejaskan efikasi Perintah Persetujuan, dan dengan itu memohon untuk meminda perintah, secara berkesannya untuk menghalang defendan dari berurusan dengan 650,000 saham-saham SunInc dan supaya jumlah RM715,000 tersebut disimpan di mahkamah sementara menunggu keputusan tindakan writ. Yang arif hakim membenarkan permohonan dan defendan merayu. Di hadapan yang arif hakim-hakim rayuan, isu-isu penting yang berbangkit adalah: (i) sama ada Perintah Persetujuan boleh dengan sahnya dipinda oleh yang arif hakim bicara; (ii) sama ada 650,000 saham-saham SunInc adalah manfaat yang berpunca dari 650,000 saham-saham asal SunCon; (iii) sama ada Perintah Persetujuan akan menjadi 'sekeping surat yang mati' jika tidak dipinda; dan (iv) sama ada bayaran tunai yang tersebut satu perkayaan tidak wajar kepada defendan.

Diputuskan (menolak rayuan)

Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:

(1) Perintah Persetujuan adalah bersifat perintah interlokutori kerana ia tidak secara muktamad memutuskan pertikaian di antara pihak-pihak berhubung halperkara di dalam tindakan. Mahkamah sentiasa mempunyai kuasa kawalan terhadap perintah interlokutori. Mahkamah boleh dalam kuasa budibicaranya meminda perintah sedemikian walaupun ianya dibuat secara persetujuan.

(2) Yang arif hakim telah melaksanakan budibicaranya dengan betul apabila meminda Perintah Persetujuan. Ini adalah kes di mana halperkara Perintah Persetujuan sudah tidak lagi wujud. Saham-saham SunCon telah ditukar kepada saham-saham SunInc ekoran satu gerakan korporat. Saham-saham SunCon berjumlah 650,000 saham dan wang tunai RM715,000 itu adalah merupakan saham-saham derivatif dan manfaat yang berasal dari 650,000 saham-saham SunCon. Jumlah RM715,000 yang diminta didepositkan di mahkamah adalah jelas bukan wang tabungan defendan. Defendan pada asasnya telah bersetuju untuk tidak mengambil manfaat peribadi dari saham-saham SunCon sehinggalah keputusan muktamad mahkamah. Oleh itu, tidak berbangkit persoalan bahawa defendan akan mengalami kesusahan untuk mendepositkan jumlah RM715,000 tersebut di mahkamah.

(3) Pindaan adalah bagi mencerminkan senario baru yang wujud selepas gerakan korporat. Hanyalah dengan meminda Perintah Persetujuan bahawa akujanji yang diberi oleh defendan sebelumnya di bawah Perintah Persetujuan akan mengekalkan kesan dan maksudnya. Jika tidak, ia akan menjadi 'sekeping surat yang mati'.

Case(s) referred to:
Khaw Poh Chuan v. Ng Gaik Peng [1996] 2 CLJ 185 SC ***(refd)***
Marsden v. Marsden [1972] 2 All CR 1162 ***(refd)***
Ooi Siew Yook & Ors v. Lim Kar Bee [1987] 2 CLJ 237; [1987] CLJ (Rep) 814 HC ***(refd)***
Purcell v. FC Trigell Ltd [1971] 1 QB 358 ***(refd)***

For the plaintiff - Ramdas Tikamdas; M/s Lachaman Lalchand & Assoc
For the defendant - Shahul Hameed Amirudin; M/s Zul Rafique & Partners

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D1-22-581-2001]

Reported by WA Sharif

JUDGMENT

Raus Sharif JCA:

[1] This is an appeal by the defendant against the decision of the High Court in allowing the plaintiff's application to modify or vary the consent order recorded on 15 January 2003 ("consent order") and for a further order for the defendant to deposit within 14 days, a sum of RM715,000 with interest thereon into court as well as other consequential orders.

[2] On 4 April 2007 we heard and dismissed the appeal with costs.

[3] The facts of this case are these. On 17 April 2002, the plaintiff filed a writ and statement of claim against the defendant for the following reliefs:

(a) to restrain the defendant from selling or conducting any dealing or transaction with 650,000 shares in Sunway Construction Berhad ("the SunCon shares") and seeking the return of the same to him forthwith.

A (b) alternatively, if the SunCon shares could not be returned to him, the plaintiff prayed that the court enter a judgment in his favour in the sum of RM1,495,000.

[4] The plaintiff in the statement of claim contends that on 3 B September 1997, he had loaned the defendant the SunCon shares to be pledged into the defendant's margin account in South Johor Securities Sdn. Bhd. The defendant promised to return the SunCon shares to the plaintiff when her margin account reach 170%. The said loan is evidenced by a loan agreement dated 30 C June 1998 executed by the defendant and the plaintiff pursuant to which the defendant promised to return the SunCon shares.

[5] After filing the suit, the plaintiff on 24 April 2002, applied by way of an *inter parte* summons in chambers for an injunction to restrain the defendant from disposing of the SunCon shares and D also for mandatory injunction for the return of the same. On 27 June 2002, the learned High Court Judge allowed the prayer for prohibitory injunction restraining the defendant from disposing the SunCon shares.

E **[6]** On 19 September 2002, the defendant filed a summons in chambers to set aside the prohibitory injunction. When the case came up for hearing on 15 January 2003, the parties informed the learned High Court Judge that they had reached a compromise. A draft consent order duly signed by counsel for the plaintiff and F defendant was tendered and the same was recorded as a consent order. It was agreed as follows:

(i) The plaintiff to withdraw the application for injunction dated 27 June 2002.

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(ii) The defendant undertakes not to sell and or transfer the 650 lots of SunCon shares owed by her until the final disposal of the action herein and also undertakes that the said shares shall be free from any encumbrances on the date of final H disposal of the suit.

(iii) The plaintiff agrees to pay cost of RM15,000 to the defendant or her solicitors.

(iv) The defendant to be given the right to reply the plaintiff's I affidavit dated 3 December 2002 at or before the full trial herein.

[7] On 31 May 2004, pursuant to a take over exercise, the SunCon shares were acquired by Sunway Holdings Incorporated Berhad ("SunInc"). In the exercise, SunInc acquired the ordinary shares of RM1 each of SunCon shares at an offer price of RM2.73 to be satisfied by cash of RM1.10 and one ordinary share of RM1 in SunInc at an issue price of RM1.63 credited as fully paid up for each of the SunCon shares.

[8] On 20 July 2004, the SunCon shares that were registered in the name of the defendant were converted to SunInc shares. As the result of the corporate exercise, for every one ordinary share in SunCon, the defendant received cash of RM1.10 per share (amounting in total to RM715,000) and one ordinary share of RM1 each in SunInc (amounting in total to 650,000 SunInc shares).

[9] Following from the above events, the plaintiff on 6 December 2004 simultaneously filed summons in chambers to amend the writ and statement of claim and summons in chambers to modify and/or vary the consent order. On 25 May 2005, order in terms was granted without objection from the defendant with regard to the plaintiff's application to amend the writ and statement of claim. However, the plaintiff's application to modify or vary the consent order was resisted by the defendant.

[10] In essence, the proposed variation to the consent order applied for by the plaintiff are:

(i) that the defendant be restrained from selling or transferring and or doing any business or transaction whatsoever in respect of the 650 lots of shares in SunCon and or whatsoever converted shares/warrant and or cash and also, if any dividends paid or to be paid for the shares presently owed by the defendant until final disposal of the suit and also undertakes that the said shares shall be free from all encumbrances on the date of final disposal of the suit.

(ii) that the defendant to deposit the sum of RM715,000 with interest thereon, which is the monies the defendant received for the SunCon shares that the defendant has undertaken to preserve until final disposal of the suit.

[11] The plaintiff's application was based on the premise that the intention of the parties when consenting to the consent order was that there would be no dealings or transactions whatsoever by the defendant in respect of the SunCon shares until final disposal of the suit. The restructuring exercise and conversion of the SunCon shares and cash payment of RM715,000 was never contemplated by either party. Thus, it is the contention of the plaintiff that the proposed variation of the consent order was merely to reflect the intention of the parties and so that the defendant should not reap unjust enrichment before final disposal of the suit.

[12] The defendant in opposing the application basically contended that the court has no jurisdiction to vary the consent order. To the defendant, the consent order is not a judgment *per se*. It is nothing more than an agreement between the parties, the terms of which have been recorded by the court. In doing so, the court is not exercising its adjudicative function but merely giving due recognition and effect to an agreement between the parties.

[13] The learned High Court Judge decided in favour of the plaintiff. Hence, consent order was varied as prayed by the plaintiff. In doing so, the learned High Court Judge held as follows:

(i) The consent order is an interlocutory or interim order as it was made pending the final disposal of the suit. Hence, the court is clothed with ample powers, to vary the consent order;

(ii) The 650,000 SunInc shares and cash sum of RM715,000 are derivative shares and benefits derived from the original 650,000 SunCon shares;

(iii) The subject matter of the consent order is no longer in existence and unless it is varied, the consent order, in its original form would remain 'a dead letter';

(iv) The cash payment of RM715,000 constitute unjust enrichment to the defendant.

[14] We are in agreement with the learned High Court Judge. It is our respectful view that the consent order is in the nature of an interlocutory order as it does not finally determine the dispute between the parties in respect of the subject matter in the suit. The court has always have control over interlocutory orders. It may, in its discretion, vary or alter them even though made

originally by consent (see *Ooi Siew Yook & Ors v. Lim Kar Bee* [1987] 2 CLJ 237; [1987] CLJ (Rep) 814, *Purcell v. FC Trigell Ltd* [1971] 1 QB 358). In exceptional cases, even a consent order which is final and has been perfected, can be set aside in the same action. (See *Marsden v. Marsden* [1972] 2 All CR 1162, *Khaw Poh Chuan v. Ng Gaik Peng* [1996] 2 CLJ 185).

[15] On the facts of this case, it is our respectful view that the learned High Court Judge has rightly exercised his discretion in varying the consent order. This is a case where the subject matter to the consent order is no longer in existence. The SunCon shares has been converted into SunInc shares due to a corporate exercise. The 650,000 SunInc shares and cash of RM715,000 are derivative shares and benefits derived from the original 650,000 SunCon shares. The sum of RM715,000 sought to be deposited into court is not from the defendant's own fund but from the take over and restructuring exercise in respect of the SunCon shares which is the subject matter of the suit. The defendant had in substance agreed pursuant to the consent order that she would not reap personal benefits from the SunCon shares until final adjudication by the court. There is therefore no question of hardship suffered by the defendant from the order sought for her to deposit the sum of RM715,000 into court.

[16] Thus, the decision of the learned High Court Judge is reasonable. The variation of the consent order is to reflect the new scenario which existed after the corporate exercise. It is only by varying the consent order that the undertaking previously given by the defendant under the consent order will maintain its intended effect. Otherwise as rightly pointed out by the learned High Court Judge, the consent order in its original form would remain 'a dead letter'.

[17] For the above reasons, we unanimously upheld the decision of the learned High Court Judge. We dismissed the appeal and the usual orders consequential on dismissal were made.